No. 80-1248

APR 6

In the Supreme Court of the United States

OCTOBER TERM, 1980

GABRIEL BRIGUGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied the effective assistance of counsel because his attorney allegedly failed to disclose that the attorney was under investigation by a federal grand jury during the course of petitioner's trial.

2. Whether the district court properly denied petitioner's motions for severance and change of venue.

3. Whether the district court abused its discretion in dealing with an incident of juror misconduct.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1980. The petition for a writ of certiorari was filed on January 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of participating in the affairs of an enterprise conducted through a pattern of racketeering activity,[1] in violation of

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[1]The acts of racketeering consisted of unlawful payments to labor union employees or officers, in violation of 29 U.S.C. 186. See 18 U.S.C. 1961(1)(C).

18 U.S.C. 1962(c), and of conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d). He was sentenced to seven years' imprisonment and fined $10,000. The court of appeals affirmed by judgment order, but expressly without prejudice to petitioner's raising his claims regarding his attorney's performance in a motion filed under 28 U.S.C. 2255 (Pet. App. 1a-3a).[2]

The evidence at trial, the sufficiency of which petitioner does not challenge, established that petitioner was part of a group that conspired to obtain illegal payments from trucking companies, through their control of a Teamsters Union local, in return for supplying labor peace. The group was led by Anthony Provenzano and included petitioner, Thomas and Stephen Andretta, and others, as well as Ralph Picardo, who was the government's chief witness at trial. The details of the scheme are outlined in our brief in opposition to the certiorari petition filed by petitioner's co-defendants (No. 80-78)[3] as well as in the previous opinion of the court of appeals affirming the convictions of the co-defendants. 620 F. 2d 985, 989-991 (1980).

Briefly, co-conspirator Ralph Picardo, who operated a trucking firm, negotiated an agreement with Interocean Service, Inc., which operated as the "in-house" trucker for a steamship company. Under the agreement, Picardo would supply trucks and owner-operator drivers to Interocean, thus enabling Interocean to avoid unionization and union obligations. Picardo also promised to guarantee that no

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[2]Petitioner was tried along with three co-defendants—Anthony Provenzano, Stephen Andretta, and Thomas Andretta—who were also convicted on both counts. Their convictions were affirmed in an earlier opinion. 620 F. 2d 985 (1980). All three then filed a petition for a writ of certiorari, and this Court denied review, No. 80-78 (Oct. 14, 1980).

[3]We are providing petitioner with a copy of our response in No. 80-78.

efforts would be made to organize Interocean's drivers and that Interocean's operations would not be interrupted by labor disputes. In return, Picardo received monetary payments through a "ghosting" scheme in which Interocean paid Picardo's company for fictitious drivers. These payments were then divided among the co-conspirators, with a one-quarter share going to petitioner and his brothers.

ARGUMENT

1. Petitioner contends that his rights to due process and to the effective assistance of counsel were violated when he was not informed that, during the course of his trial, his attorney, Thomas DiBiasi, was the target of a federal grand jury investigation into possible bank fraud in the same district in which he was being tried.

a. In August 1979, subsequent to petitioner's conviction, his attorney was indicted. The attorney later pleaded guilty. On September 20, 1979, petitioner, through new counsel, filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 (J. Supp. App. 25).[4] In an accompanying affidavit (*id.* at 26-30), petitioner stated that in the middle of April or early May, 1979, he noticed a change in DiBiasi's behavior and that DiBiasi's concentration and memory were not as sharp as they previously had been. Petitioner also averred that he felt it necessary on a number of occasions during the trial to call to DiBiasi's attention objections petitioner thought should be raised. One such incident, petitioner asserted, was during the opening argument by counsel for co-defendant Provenzano, who referred to "Briguglio" in a manner that petitioner contended might lead the jury to believe the attorney was speaking of petitioner rather than his brother. At petitoner's request, DiBiasi objected to the manner of the reference.

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[4] "J. Supp. App." refers to the Joint Supplemental Appendix in the court of appeals.

In his affidavit, petitioner also referred to several questions in DiBiasi's cross-examination of Picardo, contending that DiBiasi should have demonstrated that the union of which petitioner was an official did not have jurisdiction over the area of work in which Picardo testified that petitioner could supply labor peace. In addition, petitioner averred that he had informed DiBiasi that he was willing to take the stand but that DiBiasi advised him not to do so. Petitioner stated that his probation officer told him that he and the trial judge were surprised that petitioner had not taken the stand, because he had no prior criminal record. Petitioner also stated that the probation officer indicated that if petitioner had testified, he might have explained away his fingerprints on two checks that appeared to corroborate Picardo's testimony. Finally, petitioner stated in the affidavit that he had requested, but DiBiasi had declined, to tape record the trial proceedings, even though the court had consented to the bringing of dictating equipment into the courthouse.

Petitioner's wife also submitted an affidavit (J. Supp. App. 32-33), in which she stated that during the second week of trial, she spoke with DiBiasi concerning a plea offer from the AUSA. According to petitioner's wife, DiBiasi said that he and his wife also had discussed the difficulties of plea bargaining because an indictment would soon be returned against him, although DiBiasi later said that he was joking. Petitioner's wife also averred that she did not feel that DiBiasi was conducting cross examination in the manner she thought that he should.

DiBiasi, too, submitted an affidavit in connection with petitioner's Rule 33 motion (J. Supp. App. 35-36). He stated that while the grand jury investigation into his activities was underway, petitioner's trial had already commenced. He continued:

> I felt that I had not been in a position to withdraw from the trial and used all of my conscious efforts to properly defend my client. I feel, however, due to the nature of this investigation which eventually lead [sic] to my own indictment, that subconsciously, I was not in a position to give my client a total and proper defense and as a result of this, he may have been denied his right to competent counsel.

The district court denied petitioner's Rule 33 motion without a hearing. The court stated (J. Supp. App. 121) that "under no circumstances" would petitoner have been allowed to tape the trial and that the lawyers had been permitted to bring portable dictating equipment into the courthouse for an entirely different purpose. Moreover, in the court's view, the objection to DiBiasi's judgment that petitioner should not take the stand was "a typical afterthought of the defendant who exercises his best judgment at trial not to testify and has second thoughts" (*ibid.*). The court also rejected petitioner's assertion of error respecting the manner of DiBiasi's cross examination of Picardo (*id.* at 121-122). Finally, it found "absolutely no merit" to petitioner's contention that the jury may have confused petitioner with his brother, concluding that "[t]he jury well understood which Briguglio was being talked about at all stages of the proceeding[s]" (*id.* at 122). In sum, with respect to petitioner's motion generally, the court stated (*ibid.*):

> This motion about Mr. DiBiasi's incompetency has absolutely no merit. I sat here for three weeks, Mr. DiBiasi made effective representation. He was aggressive, he showed no indications during the course of the trial that he was in any way effected [sic] in his representation by his then pending legal difficulties which resulted in an indictment later this year.

The court of appeals affirmed by judgment order, but it made clear that its order was without prejudice to petition-

er's raising his arguments about DiBiasi's performance in a motion under 28 U.S.C. 2255.

b. Petitioner argues (Pet. 22-28) that review by this Court is necessary to determine the extent to which the conflict-of-interest principles developed in cases involving a lawyer's simultaneous representation of defendants having potentially competing interests apply to cases such as this one, where the alleged conflict of interest stems from wholly personal considerations affecting the lawyer. In *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), this Court held that in order to establish a Sixth Amendment violation, a defendant who raised no objections at trial must demonstrate that an actual conflict of interest, not the mere possibility of one, had adversely affected his lawyer's performance. *Id.* at 348-350. Petitioner asserts that because of the type of conflict alleged in this case, involving the internal psychological and emotional state of his lawyer rather than the easily perceived legal interests of different clients, it would be almost impossible to show any direct adverse effects on the quality of his legal assistance. Accordingly, he argues, the requirement of *Cuyler* that the defendant must show an adverse effect on the adequacy of the lawyer's performance should not apply to this type of conflict. Therefore, he contends that the mere non-disclosure of a personal conflict should be considered ineffective assistance of counsel as a matter of law (Pet. 41-48).

Whatever may be the merit of petitoner's legal argument—and we do not believe it is substantial on the present record—the case is not ripe for consideration by this Court. The district court did not hold an evidentiary hearing on petitioner's factual allegations. Therefore, as a threshold matter, there has been no finding that petitioner was, in fact, unaware of his lawyer's legal difficulties. And even now petitioner does not assert that he would have switched to another attorney if he had known of the grand jury's investigation of DiBiasi.

But beyond this, the record contains only the vaguest allegations of an adverse effect on DiBiasi's performance. By petitioner's own admission, DiBiasi objected to co-counsel's statements in opening argument that petitioner believed would lead the jury to confuse him with his brother. It therefore does not appear that any confusion actually resulted, even assuming that it would have in the absence of DiBiasi's objection. Further, DiBiasi's failure to tape record the trial hardly can be thought to reflect incompetence, especially in view of the court's observation that this would have been prohibited in any event. With respect to petitoner's failure to take the stand, petitioner offered only his *probation officer's* speculation that petitioner might have explained away fingerprints on two checks. Petitioner himself did not aver in his affidavit that he could or would have presented an explanation or what such an explanation might have been. Nor did he contend that he had even discussed the fingerprints or a possible exculpatory explanation for them with DiBiasi, much less what DiBiasi's reason may have been for declining to have petitioner testify if the fingerprints were discussed. Finally, petitioner's affidavit advanced only the barest speculation as to what the jury's impression might have been following the ten lines of cross examination with which petitioner took issue.

As can be seen, petitioner's averments, even if accepted as true, do not portray an incompetent attorney obsessed with his own legal difficulties. Indeed, DiBiasi himself stated in his affidavit that he used all "conscious efforts to properly defend my client" (J. Supp. App. 35); he concluded only that "subconsciously" he was not in a position to give petitioner a proper defense and, as a result, that petitioner *may* have been denied his right to competent counsel. DiBiasi furnished no particulars.

For these reasons, the present record would be a wholly inadequate one on which to consider petitioner's Sixth

Amendment claim of ineffectiveness and his due process claim of a violation of his right to intelligent selection of counsel. The court of appeals apparently agreed, for it denied relief, while expressly contemplating that petitioner might file a motion under 28 U.S.C 2255, on which the district court could hold an evidentiary hearing to explore petitioner's contentions. Given this, the case is, for all practical purposes, in the same posture it would have been in if the court of appeals simply had remanded for an evidentiary hearing on whether petitioner was aware that DiBiasi was under investigation and what the effects of that asserted conflict on DiBiasi's performance were. In that situation, the petition for certiorari plainly would be interlocutory and should be denied for that reason. The same result should follow here.[5]

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[5]In any event, the per se rule petitioner proposes—that an undisclosed personal conflict of interest should always be deemed to have resulted in ineffective assistance of counsel, irrespective of whether it adversely affected the lawyer's performance—would appear to be unsound, especially in this case. The Sixth Amendment guarantees an accused the "effective" or "adequate" assistance of counsel. *Cuyler* v. *Sullivan, supra*, 446 U.S. at 343-345, 349; *Holloway* v. *Arkansas*, 435 U.S. 475, 481, 483 (1978); *Glasser* v. *United States*, 315 U.S. 60, 76 (1942). If a lawyer makes tactical decisions at trial that he would have made even in the absence of the asserted conflict of interest—and if those tactical decisions are within a range of competence that is otherwise acceptable under the Sixth Amendment—then it would seem that the defendant has not been deprived of the "effective" or "adequate" assistance of counsel despite the asserted conflict of interest. The rule announced in *Cuyler*—that a defendant attacking his conviction on conflict-of-interest grounds must show that his attorney's performance was "adversely affected" by an actual conflict of interest—serves to ensure that an otherwise valid conviction will not be set aside except upon a showing that the lawyer's performance was, in fact, ineffective. It is not clear why a different rule should obtain simply because, as here, the alleged conflict of interest stems from personal factors affecting the lawyer, not from the lawyer's representation of several clients having competing interests.

Moreover, in the district court, petitioner did not portray DiBiasi's position as presenting a conflict of interest—*e.g.*, on the ground that DiBiasi may have been torn between a duty to represent petitioner and a

2. Petitioner also contends (Pet. 51-58) that because of the notoriety of Anthony Provenzano, his co-defendant, he could not be jointly tried with Provenzano without prejudice and that the district court erred in denying his motions for severance and change of venue. However, the Court declined to grant review on this same claim with regard to petitioners' co-defendants Thomas and Stephen Andretta (cert. denied, No. 80-78 (Oct. 14, 1980)).[6] Petitioner offers no additional reason why review should be granted as to him.

3. Finally, petitioner claims error (Pet. 59-61) in the trial court's handling of an incident of juror misconduct. The jury in this case was sequestered. Toward the end of the trial, a marshal discovered that a juror and two alternate jurors were smoking a marijuana cigarette. The incident was reported to the district judge, who related it to counsel and sought their opinions on an appropriate course of action. Defense counsel agreed that the jurors should not be removed and suggested in addition that the court inform the jurors that they would not be prosecuted. The court followed defense counsel's recommendation. See J. Supp.

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desire to curry favor with the U.S. Attorney's Office. Compare *United States* v. *DeFalco*, Nos. 78-2126 & 2209 (3d Cir. Dec. 28, 1979) (en banc), upon which petitioner relies (Pet. *passim*). Rather, petitioner's contention was that DiBiasi was distracted by the grand jury investigation and therefore did not devote his full attention to the trial. These allegations partake more of an ordinary claim of ineffectiveness of counsel than of a conflict of interest. As a consequence, it would seem to be especially appropriate to require petitioner to demonstrate that DiBiasi's performance was in fact rendered ineffective. A claim that an attorney's performance was adversely affected by the lawyer's concern about his own legal difficulties is, in practical effect, no different from a claim that the attorney was distracted by other personal considerations, such as a busy law practice, family problems, or ill health. Certainly in these situations, some showing that the lawyer actually rendered ineffective assistance would be necessary.

[6]We addressed these contentions in our Brief in Opposition in No. 80-78, at 8-9.

App. 9, 11, 16-17, 38-42, 117-118. The question whether the district court properly dealt with the incident was thoroughly discussed by the court of appeals in its review of the conviction of petitioner's co-defendants (620 F. 2d at 996-997), and this Court declined to grant further review (No. 80-78, *supra*).[7]

Petitioner now argues that there was no evidence that the person who supplied the marijuana cigarette to the juror was a person who was authorized to visit under the court's sequestration order. Based on speculation that the supplier was not an authorized visitor, petitioner further suggests (Pet. 16, 21) that, because an unauthorized visitor would not have been informed that he should not discuss the case with the juror, the supplier of the marijuana cigarette "might" have engaged in such conduct. Thus, he argues, a remand is necessary to consider the circumstances of the incident.

However, all assertedly prejudicial aspects of this incident were thoroughly examined in the initial discussion of the matter as well as on argument of the new trial motion. As the district court observed, all defense counsel agreed to the procedure to be followed, and no one asked for an inquiry of the juror involved (J. Supp. App. 111). Petitioner's belated speculation, without any supporting evidence, that the incident *might* have involved a violation of the sequestration order and, further, that the supplier *might* have discussed the trial with the juror, does not warrant review.

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[7]The marijuana incident was discussed in our Brief in Opposition in No. 80-78, at 9-15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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